78-1276

In the Supreme Court of the United States

No. .....

JOSEPH R. KAPP, *Petitioner,*

vs.

NATIONAL FOOTBALL LEAGUE, an unincorporated association, NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC., a Massachusetts corporation, SAN FRANCISCO 49ERS, a limited partnership, OAKLAND RAIDERS, a limited partnership, MINNESOTA VIKINGS FOOTBALL CLUB, INC., a Minnesota corporation, THE FIVE SMITHS, INC., a Georgia corporation, BALTIMORE FOOTBALL, INC., a Maryland corporation, HIGHWOOD SERVICE INC., a Michigan corporation, CHICAGO BEARS FOOTBALL CLUB, INC., an Illinois corporation, CINCINNATI BENGALS, INC., an Ohio corporation, CLEVELAND BROWNS, INC., a Delaware corporation, DALLAS COWBOYS FOOTBALL CLUB, INC., a Texas corporation, EMPIRE SPORTS, INC., a Colorado corporation, THE DETROIT LIONS, INC., a Michigan corporation, GREEN BAY PACKERS, INC., a Wisconsin corporation, HOUSTON OILERS, INC., a Texas corporation, KANSAS CITY CHIEFS FOOTBALL CLUB, INC., a Texas corporation, LOS ANGELES RAMS FOOTBALL CO., a Delaware corporation, MIAMI DOLPHINS, LTD., a limited partnership, NEW ORLEANS SAINTS, a partnership, NEW YORK FOOTBALL GIANTS, INC., a New York corporation, NEW YORK JETS FOOTBALL CLUB, INC., a Delaware corporation, LEONARD H. TOSE, doing business as the Philadelphia Eagles Football Club, PITTSBURGH STEELERS SPORTS INC., a Pennsylvania corporation, CHARGERS FOOTBALL COMPANY, a limited partnership, CHICAGO CARDINALS FOOTBALL CLUB, an Illinois corporation, PRO-FOOTBALL, INC., a Maryland corporation, PETE ROZELLE and JIM FINKS, *Respondents.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the case of *Joseph R. Kapp v. National Football League, et al.*, No. 76-2849 in that court.

OPINIONS BELOW

A first opinion of the Court of Appeals was rendered on August 4, 1978. It is set forth in Appendix A and is reported in 1978-2 Trade Cases, ¶ 62,198. An addition to the opinion was rendered on November 22, 1978; it is set forth as Appendix B. The opinion, as amended, is reported in 586 F.2d 644.

An opinion of the district court granting partial summary judgment declaring that respondents had violated the Sherman Act is reported in 390 F.Supp. 73 (N.D.Cal. 1974) and is set forth in Appendix C.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. Its judgment was entered August 4, 1978, and it denied a timely petition for a rehearing on November 22, 1978. A copy of the judgment is set forth as Appendix D. The district court had jurisdiction under Section 4 of the Act of October 15, 1914, c. 323, § 4, 38 Stat. 731, as amended, 15 U.S.C. § 15, and 28 U.S.C. § 1337, and under 28 U.S.C. § 1332.

QUESTIONS PRESENTED

I.

Petitioner, Joe Kapp, had an agreement with a club of the National Football League ("NFL") for employment for 2½ seasons for $600,000. After playing for the first half season and being paid a portion of the agreed compensation, he was driven out of his occupation and barred from the industry by a boycott imposed by the NFL for refusing to sign a contract form illegal under the Sherman Act into which he was asked to embody his previous agreement.

1. Is it a defense to Sherman Act liability for the boycott that the victim could have avoided the boycott by succumbing to what it sought to coerce him to do?

2. May a jury be permitted to probe into the victim's motives and hold that there was no "impact" from the boycott, despite his ouster from his occupation, on the supposition that he wished to be boycotted as an excuse for quitting? Or must not the court act upon the objective admitted fact that he was being asked to sign an illegal contract and was boycotted because he would not do so?

II.

The defense to the claim of breach of contract by the employing club, breached because of the boycott, was that the NFL's requirement that players be engaged solely on the illegal contract form was a "custom or usage" of the industry.

3. May an industry custom or usage which violates the Sherman Act be used to read into a contract, otherwise complete, an implied condition that the contract will not be effective until embodied in a contract form which violates the Sherman Act? May an industry practice, imposed by one group upon another by conspiratorial conduct illegal under the Sherman Act, ever create a "custom or usage" having any legal effect?

STATUTES INVOLVED

Title 28 U.S.C. § 1337:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 290, § 1, as amended, 15 U.S.C. § 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among

the several States, or with foreign nations, is hereby declared to be illegal."

Clayton Act, Act of October 15, 1914, c. 323, § 4, 38 Stat. 731, as amended, 15 U.S.C. § 15:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

This is an action under Section 1 of the Sherman Act for destruction of the career of the petitioner, a famous football player known throughout the sports world as "Joe" Kapp.[1]

In October, 1970, Kapp and respondent New England Patriots Football Club (the "Patriots"),[2] a member of the respondent National Football League ("NFL"), executed a written agreement, a copy of which is attached as Appendix E. By it the Patriots engaged Kapp to play professional football for 2½ years for a total compensation of $600,000, "the richest for any professional football player in the history of the game" (Tr. 1015).[3] Kapp played for the Patriots during the last half of the 1970 season, for which he was paid $154,384.12 of the agreed $600,000, but when he reported to training camp in July, 1971, to play football, the Patriots expelled him from the camp and

1. He had been an All-American college player in 1958 and was named the Most Valuable Player in professional football in 1969 by *Pro Football Guide* and the Most Valuable Player in 1969 in the National Football League by the New York Sportswriters, and he received the Vince Lombardi Award as the player most dedicated to the game. (App. p. 14, 17; R. 3, 61)

2. Then called "Boston Patriots Football Club."

3. "Tr." refers to the trial transcript, "R" to the clerk's record below, and "App." to the appendices to this petition.

from football on the orders of the NFL, binding on all the league members not to employ him, because Kapp would not sign a printed "Standard Player Contract" dictated by the NFL, to supplant his agreement of October, 1970. Kapp refused to sign that form because it contained numerous provisions used to enforce the NFL system of eliminating club competition for players' services. Kapp believed them to be a violation of the Sherman Act, and he had been repeatedly damaged by these rules at the hands of the NFL in previous years.[4]

The Antitrust Claim

Both the purpose and effect of the NFL's order were to *boycott* Kapp from any employment in professional football in the United States. His career was destroyed, and for this destruction he sued the NFL, its member clubs, and its executive head (the "Commissioner") for violation of Section 1 of the Sherman Act.

The rules of the NFL assailed by Kapp can be briefly described. Its constitution and bylaws prohibited any NFL club from employing any player except on a "standard player contract" form. By signing that form, a player agreed to subject himself to the constitution and bylaws and other NFL rules and regulations and to abide by the decisions of the NFL's Commissioner ("Pete" Rozelle) "which shall be final, conclusive and unappealable," on penalty of having his contract terminated either by the club or by the NFL Commissioner, and he acknowledged the right and power of the Commissioner to fine and suspend the player for life or indefinitely. Among the NFL rules and regulations which the player would thereby agree to accept were also the so-called "Rozelle" or "ransom" rule, the "tampering" rule, and the requirement that all contracts between any club and player had to be on the standard form. By

4. The history of his past grievances is described in the district court's opinion, appendix hereto, at App. pp. 15-18. It is more briefly related in the opinion of the court below, App. pp. 4, 5.

the "tampering" rule, every player, during the time he was under contract with one club, was prohibited from negotiating with any other, and every other club was prohibited from negotiating with him, for employment to begin even after he had fully performed his current contract and after his current employer had no further contractual rights to his services. By the "Rozelle" or "ransom" rule, no club was allowed to employ a player, even after the player had played out his contract with one club, unless it paid head money or "ransom" to the former employer in the amount and in a form dictated by the Commissioner. Consequently, the amount by which a player would be offered or paid for his services was reduced by the monetary value of the ransom. By this rule, the clubs appropriated to themselves a portion of the value or worth of a player and limited his bargaining power *vis-a-vis* the owners.

Kapp's suit was the pioneer assault on the NFL structure and rules as violating the Sherman Act. In due course, in 1974, the district court granted partial summary judgment for Kapp, holding that respondents were indeed an unlawful antitrust conspiracy because of the NFL rules and regulations referred to and because the Standard Player Contract was illegal (*Kapp v. National Football League, et al.*, 390 F.Supp. 73 (N.D.Cal. 1974). The district court held that ". . . league enforcement of most of the challenged rules is so patently unreasonable that there is no genuine issue for trial" (App. p. 27), and that the Rozelle rule "is unreasonable under any legal test." (App. p. 28). "Similarly," it held, "the so-called 'one-man rule' . . . vesting final decision in the NFL Commissioner" is "patently unreasonable." "Similarly, the tampering rule . . . and the Standard Player Contract rule . . . are also patently unreasonable insofar as they are used to enforce other NFL rules in that area." (App. pp. 28, 29.)

Just as the suit was the pioneer suit, this summary judgment decision was a pioneer decision about professional sports, regarded in decisions and law reviews as a leading and persuasive precedent.[5] Following upon the district court's summary judgment decision, other suits have been brought, resulting in decisions bringing professional sports into conformity with the law and announcing that, despite the mystique of professional sports and the love affair between them and the American public, they too must obey the law of the land. The "tampering" rule, the "Rozelle" rule, rules about the Commissioner's arbitrary power, have all been held to be illegal, in cases citing the district court's decision here. See, for example, *Mackey v. National Football League*, 407 F.Supp. 1000 (D.Minn. 1975), aff'd *Mackey v. National Football League*, 543 F.2d 606 (8 Cir. 1976) cert. dismissed, 434 U.S. 801 (1977); *Smith v. Pro Football*, 420 F.Supp. 738 (D.D.C. 1976), aff'd in this respect in *Smith v. Pro Football*, ... F.2d ....., 1978-2 Trade Cases ¶ 62,338 (D.C. Cir. 1978); *Robertson v. National Basketball Association*, 389 F.Supp. 867 (S.D.N.Y. 1975).

In consequence the assailed NFL rules and structure were forced to change and have since been materially modified by the NFL.[6] Moreover, a Sherman Act class action on behalf of over 5,700 former and present professional football players was brought against the NFL, because of the NFL rules, and settled for nearly $14,000,000 distributed among the class. *Alexander v. National Football League*, 1977-2 Trade Cases, ¶ 61,730 (D.Minn. 1977); *Reynolds v. National Football League*, 584 F.2d 280 (8 Cir. 1978). Since the class embraced only those who were under contract to play football after September 17, 1972, it did not include Kapp.

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5. For example, *National Football League Restriction on Competitive Bidding for Players' Services*, 24 Buffalo Law Rev. 613 (1975).

6. See *Reynolds v. National Football League*, 584 F.2d 280, 285 (8 Cir. 1978).

Thus, although the structure of professional football has been forced to change, and although millions have been paid to the players by the NFL, Kapp, the first to challenge the illegal structure, alone remains uncompensated for the damages inflicted. And Kapp, first to sue, still has his case in court because the trial court postponed trial until after trial of the later filed *Mackey* case and the court below held the appeal under submission for nearly one year after oral argument. If this anomaly merely meant an injustice, however cruel, to one man, Kapp, a petition for the attention of this Court might not be warranted. But the reasor for the anomaly lies in the fact that, in the trial that followed the summary judgment, erroneous instructions were given the jury on issues that go to the heart of the antitrust laws and sustained on appeal on reasoning that transcends the injustice to Kapp.

The crux of the matter is the manner in which Kapp was driven out of his occupation, and that was established by the uncontradicted admissions and testimony of respondents. It was admitted that "no club can make use of the services of a player who declines to sign a standard player contract" (R. 331, pp. 33, 35). The president of the Patriots, Kapp's club, summed it all up when he testified:

> "This argument is really not between Joe Kapp and the Patriots . . . . [I]t is between Joe Kapp and the National Football League. We wanted Joe to play for us and he was ready to do so until the Commissioner informed us that he could not even practice until he signed a Standard Player Contract like everyone of the 1,400 players in the League." (Tr. 1050.)

The Patriots even offered to pay a fine to the NFL if it would lift the ban on Kapp and allow him to play, as he was ready to do, but the Patriots were rebuffed with the reply that nothing short of Kapp's capitulation to a standard player contract would

suffice (Tr. 1130, 1502-06, Pl. Ex. 10). NFL's Commissioner, Rozelle, likewise summed up the situation when, asked if he "ordered" or "forced" Kapp to leave training camp in July 1971, he testified:

> "what I said was that Joe Kapp would have to sign a standard player contract. at which time he would be perfectly free to practice and play with the Patriots, but he could not practice and play with the Patriots until he signed a standard player contract." (Tr. 2948.)

He also testified (Tr. 1123-28, and pl. ex. 9):

> "Kapp has to sign a [standard player] contract. That's fundamental. . . . They [the players] love the adulation. But they have to pay the price for the benefits. His [Kapp's] price is to honor the structure of the game . . . ."

The facts being undisputed, the trial court in its summary judgment decision put the matter pithily thus (App. p. 29):

> ". . . the record here shows that the immediate cause of plaintiff's discharge by the New England Patriots was his refusal to comply with demands that he sign the Standard Player Contract.
>
> "However, as already explained, signing of the Standard Player Contract . . . would bind a player to the whole NFL Constitution and By-Laws which, in turn, include the rules herein held to be illegal."

In short, Kapp was driven from his occupation by a boycott fastened on him by respondents because he declined to sign a contract form containing provisions violative of the Sherman Act, a contract form which was an essential instrument in respondents' unlawful manner of conducting the business of professional football.

After the summary judgment decision, nothing remained for trial on the antitrust claim except the amount of damages. If there was legitimate room for a jury as to *how much*, there could be none that Kapp was entitled to recover some award. (The

unpaid portion of his agreed compensation with the Patriots, who wished to continue his employment but were prevented by the NFL, was over $455,000.) But the trial court, although maintaining its decision about illegality and violation, eviscerated it by the instructions it gave and declined to give on "impact." In a private antitrust case there must, of course, be impact on the plaintiff as well as violation. But here there was impact as a matter of law by virtue of Kapp's having been driven out of his occupation by the boycott for refusal to sign the standard form. In the words of Mr. Justice Black in *Simpson II, Simpson v. Union Oil Company,* 396 U.S. 13, 15 (1969), "petitioner's . . . business was destroyed by respondent through conduct . . . held to be in violation of the antitrust laws". Kapp asked the trial court to so instruct the jury. He asked the court to charge (Tr. 2730-32) that ". . . Defendants, acting together as and in the National Football League, had no right to demand or insist that Kapp sign a Standard Player Contract form . . . in order to be permitted to play football," that

> "By refusing to allow plaintiff Kapp to play football, defendants were guilty of boycotting him, and that boycott was a violation of the antitrust laws. The fact that Kapp refused to sign a standard player's form of contract did not justify the boycott and is no defense to Kapp's claim of damages."
>
> "Since the requirement by defendants that Kapp sign a Standard Player Contract in order to be allowed to play football was unlawful, Kapp did not have to sign it and he was entitled to refuse to do so and is now entitled to recover damages inflicted on him by the subsequent refusal of defendants to let him play."

The trial court refused to instruct the jury as requested. The defense that respondents' conduct did not violate the Sherman Act having failed, the heart of the defense became that all that Kapp had to do to avoid being driven out of his occupation and to

avoid loss of his agreement with the Patriots was to sign a mere piece of paper, and that by refusing to do so he brought the injury upon himself. The court's instructions sanctioned this defense; it allowed the jury to determine that Kapp's refusal to sign the standard player contract was a defense to the antitrust claim because Kapp could have remained in football merely by signing the standard player contract. Instructing the jury about the duty to mitigate damages, the court refused to instruct that that duty did not require Kapp to sign the standard player contract and that damages, otherwise awardable, could not be diminished or denied because Kapp refused to sign, despite respondents' argument to the jury that:

> "But moving along to mitigation . . . what is it that he could have done? . . . Well, one thing he could have done, he could have played football with the Patriots, and he would have had $445,000 for doing that." (Tr. 3638.)

But the NFL would not let him do that unless he signed the illegal contract.

The instructions invited the jury to substitute its own views of national public policy for those proclaimed by Congress and the courts, and the jury did so.[7] It returned a verdict denying Kapp any recovery at all.

The Allied Contract and Tort Claims

Another claim presented by Kapp was a contract claim against the Patriots for breach of his October, 1970, agreement, under which over $445,000 remained unpaid, and his tort claim against

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7. In a brief below, respondents quoted (at R. 2993) the foreman of the jury as saying:

> "But Mr. Kapp stopped his own career when he refused to sign."

And another juror as stated that, if Kapp wanted to play, he should have played "according to the rules," a view that adopted Commissioner Rozelle's statement, quoted above, that the price Kapp had to pay in order to play football was "to honor the structure of the game." But the "rules" and the "structure of the game" were contrary to national policy.

other respondents for inducing breach of that contract. On its face that agreement (Appendix E attached) was a definitive contract and was so recognized by the trial court.[8] But respondents advanced a number of arguments why, nevertheless, it should not be regarded as a binding contract, all being variations of the one contention that the contract was impliedly conditioned upon being embedded in the standard player form. The trial court refused to instruct the jury that no such condition could be implied because a requirement to sign the standard form violated the Sherman Act (Tr. 3360). Instead, the court instructed the jury that it should consider whether there was a "custom" or "usage" that all contracts with players had to be on a Standard Player Contract form and, if it found such a custom or usage, to apply it. In consequence, the verdict denied Kapp recovery even on his contract claim.

The Decision of the Court of Appeals

The Court of Appeals held the case under submission for almost one year following oral argument. Then it affirmed. It did *not* disagree with the trial court that the several rules embodied in the Standard Player Contract form violated the Sherman Act and that the form itself was illegal.[9] Furthermore, it *agreed* that the case "has all the appearances of a group boycott of the type condemned as *per se* unlawful in *Klors, Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959)." (Appendix, pp. 6, 7). But

8. "MR. LASKY: ". . . What he did sign without the Standard Player's Contract is on its face, in and of itself a complete binding and valid contract.

THE COURT: That is right." (Tr. 3360).

JURISDICTION over these claims was both diversity and pendent.

9. It could hardly have done so in view of the decision of the 8th Circuit in *Mackey v. National Football League*, 543 F.2d 606, which affirmed a judgment of the trial court in that case, *Mackey v. National Football League*, 407 F.Supp. 1000 (D.Minn. 1975), wherein the trial had occurred after the summary judgment decision but before the trial in this case. The *Mackey* decision established a collateral estoppel. *Parklane Hosiery Co., Inc. v. Shore*, ... U.S. ....., 47 U.S. L. W. 4079 (1979).

then it went off on the theory that there was evidence on which the jury could find

> "that for personal reasons of his own Kapp had decided to discontinue playing football, that he had decided to seek less strenuous employment in the entertainment field, that his only interest in professional football now lay in attempting to recover threefold any financial loss he may have suffered through his election not to play." (Appendix, p. 8).

A petition for certiorari is not the place to note the gossamer and imaginative nature of the evidence on which such a finding of Kapp's inner mind is rested. We shall assume that the jury went off on this theory of Kapp's inner mind. The issue, then, is whether the theory can be tolerated in federal antitrust jurisprudence.

On the contract issue, the Court of Appeals affirmed on the basis that the jury could find a "custom and usage" that all player contracts be on the Standard Player Contract form. If this aspect of the case involved no more than an interpretation of state contract law, we would recognize that it, too, would furnish no basis for review by this Court, however bizarre the interpretation.[10] But the issue is not severable from federal antitrust law, for the issue is whether an industry "custom or usage" which violates the Sherman Act can be used to read into a contract, otherwise complete, an implied condition itself violative of the Sherman Act, or whether any conspiratorial rule illegal under that Act, no matter how long successfully enforced in the industry by the conspirators, can ever create a "custom or usage" having any legal effect.

10. A "custom" or "usage" is something that grows up by a common consensus. It is not something created and imposed by dictate by one class upon another. 5 Williston on Contracts, 3d ed., § 658. NFL conceded (R. 1430) that the Standard Player Contract was "imposed" by it on the players "by long-standing League practice and tradition."

REASONS FOR GRANTING THE WRIT

The questions presented are fundamental to antitrust law. The decision below departs from law settled by this Court, conflicts with decisions of other circuits, and introduces into antitrust law concepts never accepted elsewhere and which open up gaps of immunity and great inroads on both *Klors, Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959), and *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). The decision has already been cited and relied on to chill vigorous private prosecution of antitrust violations.[11]

A. On the First Question: One Threatened with a Boycott to Coerce Him Into Compliance with a Sherman Act Conspiracy Need Not Succumb to it, and His Motive for Refusing to Do So Is no Defense for the Boycotters.

According to the rationalization of the court below, the jury believed that Kapp wished to "quit" football and hoped that respondents would boycott him so as to give him the opportunity to "quit". Let this fancy be assumed to be fact. Nevertheless, he reported and offered to play and perform his engagement. He sought to do so, short of signing the illegal contract as the condition of being allowed to do so. No one has ever contradicted that fact or the fact that he was ordered out of football and denied the right to play because he would not sign the illegal contract (*See* pp. 8, 9, *supra.*) That fact was admitted in the pleadings, by the answers to the complaint (R. 73-74, 92-94), and the NFL's official personnel records, prepared by it before this suit was brought, stated starkly and tersely (Tr. 1101-04 and Pl. Ex. 3), "Kapp was ordered to leave the Patriots' 1971 training camp when he refused to sign a Standard Player's Contract." No one has ever suggested, much less offered even a splinter of evidence, that he would have refused to play if he had not been boycotted. He even had the

11. *Alexander v. National Football League,* 1977-2 Trade Cases, ¶ 61,730 at p. 72,986; *Robertson v. National Basketball Association,* 72 F.R.D. 64, 69 (S.D.N.Y. 1976).

services of the Players Association in demanding that he be permitted to play.[12]

The applicable principle is one of the most elementary throughout the law: One is entitled to insist on his legal rights regardless of his motives for doing so. That principle manifests itself in numerous ways.[13] Courts do not inquire into the ulterior motives that actuate a plaintiff in bringing suit, if he has a legal right he seeks to protect.[14] Civil liability is determined by conduct, not by mental states, unless the conduct is actionable in the absence of special justification. Refusal to do what one is not bound to do is not actionable, irrespective of the motive for the refusal.[15] The principle that one who consents to an act cannot complain of it ("volenti non fit injuria")[16] and the principle of *pari delicto*[17]

12. The Players Association appeared as *amicus curiae* on behalf of Kapp (R. 3037), and its executive officer, Garvey, testified to the Players Association's opposition to Kapp's expulsion. (Tr. 3169, 3228; *see* also R. 839, 847; Tr. 2951-54, 3181, 3188-89, 3194-95).

13. For example, an otherwise valid objection to a tender of performance is not made ineffective because the creditor's real motive for objection is to take advantage of a default. 74 Am.Jur.2d, Tender, § 10, p. 553. The motive of a purchaser in rescinding a purchase contract is immaterial if there has been a breach by the vendor entitling the purchaser to rescind. 77 Am.Jur.2d, Vendor and Purchaser, § 546, p. 674; *Crim v. Umbsen,* 155 Cal. 697, 103 P. 698 (1909).

14. 1 Am.Jur.2d, Actions, § 55, p. 587; *Dickerman v. Northern Trust Co.,* 176 U.S. 181, 190 (1900); *Johnson v. King-Richardson Co.,* 36 F.2d 675, 677 (1 Cir. 1930):

> "The rule generally prevailing is that, where a suitor is entitled to relief in respect to the matter concerning which he sues, his motives are immaterial; that the legal pursuit of his rights, no matter what his motive in bringing the action, cannot be deemed either illegal or inequitable; and that he may always insist upon his strict rights and demand their enforcement."

15. *Ross v. Wright,* 286 Mass. 269, 190 N.E. 514 (1934).

16. E.G., *Pinney & Toplift v. Chrysler Corp.,* 176 F.Supp. 801 (S.D. Cal. 1959).

17. *Pennsylvania Water & P. Co. v. Consolidated G.E.L. & P. Co.,* 209 F.2d 131 (4 Cir. 1953), *cert. denied,* 347 U.S. 960 (1954).

are both general principles of the law; yet both have been excluded from antitrust jurisprudence, the first in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1960) and the second in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), although both relate to *conduct* and not merely to an *inner motive*. They are excluded from antitrust jurisprudence because, on the basis of considerations personal to a particular plaintiff, they undermine the public policy of encouraging antitrust enforcement.[18] How incongruous it is, then, to introduce into antitrust law a principle about motive contrary to that recognized by other branches of the law.

The reasons for the principle recognized elsewhere are summed up by this Court in *Dickerman v. Northern Trust Co.*, 176 U.S. 181, 190 (1900) and in 1 Street, *Foundations of Legal Liability*, 356 (1906). *Dickerman* states, "If the law concerned itself with the motives of the parties, new complications would be introduced into suits which might seriously obscure their real merits." Street points out that an ill motive does not convert a lawful act into an unlawful one for otherwise the "result would be to put all our actions at the mercy of a particular tribunal [jury] whose views of their propriety might differ from our own." These statements are apropos because here a jury, upon its own notion of public policy that players should "honor the structure of the game" although that structure is an unlawful one, has been affirmed on a rationalization about a motive Kapp is supposed to have had in doing what he had a lawful right to do, *viz.*, refuse to succumb to unlawful coercion to join in an unlawful structure. The decision below

18. As said in *Simpson v. Union Oil Company*, 411 F.2d 897, 904 (9 Cir. 1969), citing *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 139 (1968), and other decisions of this Court:

> "The Supreme Court, this court, and many other courts, have repeatedly emphasized that the private remedy was established by the Congress as a matter of public policy, to enlist persons injured by antitrust violations as enforcers by providing an inducement, treble damages plus expenses."

holds that one who refuses to succumb to an unlawful demand may be barred recovery for his injuries resulting from the boycott by speculations about his motive.

With such a principle every private antitrust suit by a coerced or boycotted person will become an inquisition into psychoanalysis. Indeed the ramifications of the decision are staggering. Under its reasoning a black or a woman, suing for denial of employment under Title VII of the Civil Rights Act of 1964, could be denied recovery on a determination that he or she preferred the lawsuit to the job.

Antitrust law has been particularly sensitive to the principle that where a violator's conduct makes it impossible to prove what would have happened if there had been no violation, he cannot ask for surmises in his favor. The presumptions go the other way. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co. v. Peterson Parchment Paper Co.*, 282 U.S. 555 (1931). They way for respondents to have tested whether Kapp wanted to "quit" was to have offered to let him play, not to bar him. Whether one quits is an objective fact, to be determined by evidence of objective fact, not by a brain probe. If the NFL had not ordered Kapp out of football—if it had only said, "Go ahead and play without signing the Standard form," and *if* then he had quit, the case would be different. The NFL's own conduct made it impossible to prove what *would* have happened *if* it had not ordered him out of football. It cannot compel the boycotted party to disprove that something would have occurred in a situation which the wrongdoer's own conduct prevented from occurring.

The *decision below ignores a crucial antitrust question:* Why was the NFL so insistent that the Standard Player form be signed, or why, if signing were an idle scribble on a mere "piece of paper," did the NFL insist upon it? The obvious purpose of the insistence was to terrorize all football players, to show that no player could stand out against the power of the club owners organized into

the NFL, to bring Kapp, an outstanding player and courageous human being, to his knees, and to make an object lesson of him as a threat to all players. In *Simpson v. Union Oil Co., supra,* 377 U.S. 13, 17, this Court observed:

> "If that were a defense, a supplier could *regiment* thousands of otherwise competitive dealers in resale price maintenance programs merely by fear of nonrenewal of short-term leases."

In *Lessig v. Tidewater Oil Company,* 327 F.2d 459 (9 Cir. 1964), *cert. denied,* 377 U.S. 993 (1964), the court said (p. 472):

> ". . . If Lessig proved damage to himself from such a course of conduct—for example, by cancellation of his lease and dealer contract *because he refused to become a party to a system of illegal exclusive dealing and tying arrangements*—we see no reason why he could not recover. He clearly could if the arrangements violated the Sherman Act."

That is precisely this case. The Standard Player Contract was not just a piece of paper to be signed lightheartedly. It and its provisions were part of the bundle of illegal rules and practices of the NFL constituting the illegal combination and conspiracy. Had Kapp signed it he would have become a "party to a system" of antitrust illegality.

Coercion is ' "a wrongful demand which will result in sanctions if not complied with' "." (*Marquis v. Chrysler Corp.,* 578 F.2d 624 (9 Cir. 1978).) Under that elementary definition, Kapp *was* coerced, the threatened sanction was concerted denial of employment, he refused to comply, and the sanction was imposed. That can be nothing but impact as a matter of law, and it is nonetheless so if it be assumed that, inside of his heart Kapp was tired of playing football and was motivated to decline to succumb to the coercion in anticipation of having a lawsuit.

Conduct whose purpose is designed to coerce others into conformity with an illegal antitrust structure is of particular

antitrust significance. As said in *Knutson v. Daily Review,* 548 F.2d 795, 805 (9 Cir. 1976), *cert. denied,* 433 U.S. 910:

> "Elimination of a nonconforming dealer notifies all other dealers that adherence to the manufacturer's resale prices will be enforced."

Such elimination is unlawful when it is the "enforcement mechanism for an unlawful restraint" (p. 805). In *Canadian American Oil Co. v. Union Oil Company,* 577 F.2d 468, 472 (9 Cir. 1978), *cert. denied,* ..... U.S. ....., 47 U.S.L.W. 259 (1978), it was held that a local act of alleged coercion of a dealer to compel price maintenance implicated interstate commerce because "independent dealers similarly situated to appellants in either event received the message that obdurate price cutters faced dealer contract cancellation."

The court below argued (App. 8):

> "That Kapp's principal concern was not with the ability to play professional football free from the restraints imposed by the rules is strongly suggested by the fact that he was urged by both the Patriots and the League to sign a Standard Player Contract with the right reserved to challenge the rules should they be applied against him in the future."

There was, in fact, no such offer of a right reserved,[19] but, again, for the purposes of this petition we may assume that there was,

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19. The assertion is a defense argument that the trial court rejected in this colloquy between it and defense counsel (Tr. 3365-66):

> "THE COURT: There is no evidence in this case that he was ever offered the opportunity to sign a contract which did not bind him to the Draft or Rozelle Rule. . . .
>
> They offered to let him sign it on the condition that any existing causes of action that he had could be retained.
>
> "But then there was evidence in the case, even from Rozelle, that he would never have allowed and did not allow any kind of a 'no waiver' clause that would eliminate the agreement to those two rules."

for it underscores the error of the decision. No offer of reserved right from respondents was necessary for Kapp to have had the right to "challenge" the legality of any rule or practice should it be applied to him in the future, for one need never honor an illegal contract. The law gave him that right, and any such offer by respondents, if made, would add nothing.

But the right to ignore an illegal contract does not impose a duty to enter into it. Denial to Kapp of any recovery because he had it in his power to execute the Standard Player Contract form and thus prevent his ouster could be valid only, at the very least, if the demand that he sign were lawful. If a highway robber at the point of a gun demands "your money or your life" and then, when the victim declines to give up his money, kills him, a defense to a murder charge or to an action for damages by his dependents that the victim committed suicide would be laughed out of court, as would a claim, based on whatever evidence, that he desired death.

The argument that one must first "sign" and then sue or first "perform and then sue" has been rejected wherever raised in the past. A retail gasoline dealer driven out of business because he would not accept a price fixing agreement may really not have wanted to be in the service station business at all. But if he stayed in business until driven out, his secret desires, ascertainable only by a brain probe, are no defense.

In *Simpson v. Union Oil Company*, 377 U.S. 13 (1964) a service station dealer who was terminated because he refused to adhere to his written contract to charge for gasoline the prices his supplier directed was held entitled to recover the profits he would have made if he had continued as a dealer. He was not relegated to a later suit for such damages as he might have sustained by performing the contract and following price directions.

In *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926), under rules of the defendant shipowners' association no seaman could obtain employment without registering with the association, receiving a certificate, awaiting his turn, and taking the employment then offered or none. The activities were held to be a violation of the antitrust laws. The sailor did not have to succumb, register and obtain a certificate before having a right to complain.

In *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240 (5th Cir. 1974), a service station dealer sold his service station because of threats to terminate him in circumstances which constituted a violation of the antitrust laws. The district court ruled that the plaintiff should have held on and waited to see if the defendants did terminate him and, if they did, then sue for damages. The district court denied recovery because he voluntarily quit. The court of appeals reversed, saying (p. 1244):

> "The anti-trust law does not require a plaintiff to retain possession of a business oppressed by antitrust violation until the business is bankrupted or directly shut down by the violator."

In *Bowen v. Wohl Shoe Company*, 389 F.Supp. 572 (S.D.Tex. 1975), plaintiff sued under the Sherman Act for discharge from employment in a shoe store because she owned an interest in another shoe store. As respondents here, defendants claimed that the employee was not discharged but quit because she severed her employment by her "own decision" to continue ownership in the other store, after being told "to make your election" between that and continuing as an employee. The court's response to this was (p. 578):

> ". . . Plaintiff's employment was clearly terminated by defendant for her operation of the Conroe store. Defendant's termination of the plaintiff was the end result of its volitional move either to have plaintiff give up the Conroe store or lose her job."

B. On the Second Question: A Provision Violative of the Sherman Act and Imposed on an Industry by an Illegal Conspiracy Cannot Be Implied Into a Contract Under the Guise of Custom or Usage.

As noted above (p. 12), Kapp's written agreement of October, 1970, with the Patriots (Appendix E) was a definitive contract on its face. The court below affirmed the verdict of no recovery on that contract purely on the basis that the jury could and did find a "custom and usage" of the NFL that all player contracts be on the Standard Player Contract form, and that the trial court did not err in letting the jury proceed, on *that* basis, to imply a condition into the October agreement that it was to become a contract only when embedded into a Standard Player Contract form.

But the use of a Standard Player Contract form, if general, had become so only because it was created and imposed by the NFL's combination and conspiracy. (See fn. 10, supra.)

The issue was presented early in the clearest form in this colloquy in chambers before the court instructed the jury (Tr. 3360):

> "MR. LASKY: . . . . may a jury imply, that this is not the contract because the parties are to be deemed to have intended to enter into a further and illegal manifestation?
>
> THE COURT: As a matter of contract, I'm wondering. I think I have come to the conclusion that he wouldn't have been required to sign it."

Yet it instructed the jury the other way, and the court below affirmed. The issue is of paramount importance. Even general law holds that customs contrary to law cannot be read into contracts. 5 Williston on Contracts (3d Ed.) p. 71, § 655; *Wymard v. McCloskey & Co.*, 342 F.2d 495 (3d Cir. 1965), *cert. denied*, 382 U.S. 823. What the law will discountenance in an express contract it will not imply into a contract by custom or usage. 5

Williston, § 659, p. 93. A usage in violation of law can never grow into a valid custom. *Anderson v. L. C. Smith Constr. Co.*, 276 Cal.App.2d 436, 444, 81 Cal.Rptr. 73 (1969).

Federal antitrust law often rejects what general law accepts. It cannot tolerate what even general law rejects. The principles just summarized must exist with added force when the illegalizing factor is a federal policy so favored as that of the antitrust law. Since an express contractual provision is unenforceable when to enforce it would be to enforce "the precise conduct made unlawful by the [Sherman] Act," *Kelly v. Kosuga*, 358 U.S. 516, 520 (1959), *a fortiori* an otherwise complete contract cannot have read into it a condition that it is to go into effect only upon engaging in the precise conduct made unlawful by the Act.

Moreover, the instruction given to the jury was that custom and usage can be implied only "when it is obviously necessary and indispensable to effectuate the intention of both parties" (Tr. 3773-74). That instruction put to the jury the question whether the *Standard Player Contract was indispensable to professional football!* But no jury may be permitted to find that conduct violative of the Sherman Act is indispensable. It has been the routine defense of antitrust violators since 1890 that their conduct is indispensable to their business, and uniformly this Court has refused to listen to such a defense, for example, *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

CONCLUSION

We respectfully submit that the petition should be granted.

Dated: San Francisco, California, February 15, 1979.

MOSES LASKY
Attorney for Petitioner

Appendix A

United States Court of Appeals
for the Ninth Circuit

JOSEPH R. KAPP, Plaintiff-Appellant, v. NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al., Defendants-Appellees.	No. 76-2849
JOSEPH R. KAPP, Plaintiff-Appellee, v. NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC., Defendant-Appellant,	No. 76-2878
JOSEPH R. KAPP, Plaintiff-Appellee, v. NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al.,	No. 76-2879

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: MERRILL, TRASK and CHOY, Circuit Judges

TRASK, Circuit Judge:

This appeal is the result of several years of litigation concerning former professional football quarterback Joseph Kapp and his relationship with the National Football League (NFL). Kapp originally filed suit against the NFL, its 26 member clubs, its Commissioner, Alvin Ray "Pete" Rozelle and other named individuals. He alleged that certain rules of the NFL violated the antitrust laws and caused his unlawful expulsion from profes-

sional football in 1971. In addition, he claimed that the New England Patriots breached an alleged contract with him. The Patriots counterclaimed against Kapp.

Kapp moved for partial summary judgment on the antitrust issues. This resulted in a finding by the district court that the challenged rules violated the antitrust laws. *Kapp v. National Football League,* 390 F. Supp. 73 (N.D. Cal. 1974).

For a clear understanding of what the court held in granting this partial summary judgment, some background is necessary. The NFL is an unincorporated association consisting of member clubs, which own and operate professional football teams. The League schedules contests among the various teams, promulgates rules intended to resolve disputes and promotes the welfare of the teams and their players, and performs other administrative tasks. Since 1960, Pete Rozelle has been the League's Commissioner and chief executive officer. The NFL provisions which Kapp attacked are set out below.

The draft rule. The "draft" rule contained in Article 14 of the NFL Constitution provides that at an annual meeting the member clubs would select prospective players, principally from the ranks of the outstanding college and university graduates. The effect of this rule is to prevent other teams from negotiating with a player, even if the selecting club made an unacceptable contractual offer to him.

The tampering rule. To prevent interference with the selecting club's right to its draft choices and active players, the "tampering" rule of Article 9.2 provides that a club may not negotiate with, or make an offer to, another team's player.

Standard Player Contract. Before a player can participate in the NFL, he must sign a Standard Player Contract. This was part of the 1968 collective bargaining agreement, the 1970 collective bargaining agreement, and appears in Article 15 of the 1971 NFL Constitution. The Contract provides that the player becomes bound by "the Constitution and By-laws, the Rules of the League,

of the Club, and the decisions of the Commissioner of the League. . . ." Specific terms such as salary, length of contract, and other matters were incorporated into the Standard Player Contract for each player.

The option rule. This rule gave the employing club a unilateral right to renew a player's expired contract for an additional year at a reduced rate of compensation, which could not be less than 90 percent of his compensation for the previous year. This rule was intended to induce a player to renew his contract, and not "play out his option" so as to be free to negotiate with other clubs.

The Rozelle Rule. Even after a player becomes a free agent, another club could not employ him until it complied with the "ransom" or "Rozelle Rule" of Article 12.1(H) of the Constitution. This rule provides that the new employing club may not sign a contract with a free agent unless it first makes "satisfactory arrangements" with the former employing club, or, if these are impossible, employ the free agent subject to the unreviewable power of Commissioner Rozelle to award one or more players to the former employing club from the acquiring club's active, reserve, or selection list.

The district court examined these provisions and found that under a "reasonableness" analysis, the antitrust laws had been violated. 390 F. Supp. at 82-83. Specifically, the district court found the Rozelle Rule to be an unreasonable restraint under any legal test.[1] The draft rule was also found to be unreasonable.

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1. *See* Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976). In *Mackey,* after a full trial on the merits, the court determined that the Rozelle Rule was unduly restrictive and unlawful under the antitrust laws. It also determined that the labor exemption to the antitrust laws, *see* Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965), might apply to the Rozelle Rule if it had been a subject of bargaining. But, the court found that the Rozelle Rule was not a bargainable item in negotiations between the NFL and the players' union. As a consequence, the labor exemption could not apply. We decline to offer advice as to the collateral estoppel effect the *Mackey* decision has against the NFL on this issue under Blonder-Tongue v. University Foundation, 402 U.S. 313 (1971).

Finally, the tampering rule and the Standard Player Contract were found to be unreasonable, but only "insofar as they are used to enforce other NFL rules in that area." The court did conclude that the option rule could not be found unreasonable on partial summary judgment.

In defense, the NFL had asserted that all of the challenged rules were part of both the 1968 and 1970 collective bargaining agreements negotiated between the National Football League Players' Association (NFLPA) and the NFL. This could have placed the rules outside the coverage of the antitrust laws under the labor exemption. *See Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676 (1965). But the district court found that at the time Kapp was allegedly forced out of professional football, no collective bargaining agreement was in effect. This was due to the fact that the 1968 contract had expired in February 1970 and the new contract for 1970-74 was not signed until June 1971.

The defendants attempted to have this decision certified for interlocutory appeal under 28 U.S.C. § 1292(b), but the district court denied the motion.

The matter then proceeded to a jury trial. The trial court, in its partial summary judgment, reserved for trial the issue of whether NFL enforcement of the provisions found violative of the antitrust laws could be deemed to have been the cause of Kapp's damages.

At trial, Kapp's involvement with the NFL was outlined. In 1959, the NFL Washington Redskins drafted Kapp, then a college player at the University of California. Instead of playing for the Redskins, Kapp joined the Canadian Football League (CFL), where he played from 1959-66. During this time, the Redskins kept Kapp on their reserve list, thus barring other NFL teams from negotiating with him.

During 1966, the year that his last Canadian contract expired (subject to an option of the Canadian team to renew the contract

for 1967), Kapp conducted negotiations with the Houston Oilers of the then existing American Football League (AFL). He signed a contract with the Oilers on February 10, 1967, but on April 12, 1967, Commissioner Rozelle and the President of the AFL, acting together, declared this contract invalid, apparently because of an understanding among the NFL, the AFL, and the CFL that players would not be permitted to negotiate during their contract periods to move from one league to another.

On September 3, 1967, Kapp signed a two-year contract with the Minnesota Vikings of the NFL. This contract was the Standard Player Contract, and incorporated a memo agreement on Kapp's compensation and special terms. The Vikings paid Kapp's Canadian team $50,000 for his release, and made satisfactory arrangements with the Washington Redskins for any claim to Kapp which they had. Kapp played for the Vikings during the 1967 and 1968 seasons; he also played with them during the 1969 season, after they exercised their option for a third year. The Vikings then offered Kapp another two-year contract on the same terms as his original one, but he refused to sign it. The Philadelphia Eagles and the Houston Oilers also expressed interest in Kapp, but neither team made a firm offer. Kapp claimed that the teams were restrained by the Rozelle Rule, which would have required them to pay "ransom" to the Vikings.

The New England Patriots, however, were willing and able to make "satisfactory arrangements" with the Vikings in exchange for the right to Kapp's services. They gave the Vikings their first round draft choice for 1972, in addition to the player they had selected first in the 1967 draft. After the conclusion of this agreement, the Patriots and Kapp executed a memo agreement on October 6, 1970. In exchange for a total compensation of $600,000, Kapp agreed to play with the Patriots for the remainder of the 1970 season and for the entire 1971-72 seasons.

Kapp played for the remainder of the 1970 season under this agreement. In January 1971, the Patriots acted pursuant to the NFL Constitution in sending Kapp a Standard Player Contract, which the Constitution required him to sign. As we have discussed, upon signing the Standard Player Contract, the player became bound by all the rules contained in the Constitution and the contract itself. Those included the draft rule, the tampering rule, the option rule, the Rozelle Rule, and the one-man rule. Kapp, however, refused to sign the contract.

On May 28, 1971, Commissioner Rozelle reminded the Patriots that the NFL Constitution required a player to sign a Standard Player Contract before he could play in a game or practice with his club. The Patriots permitted Kapp to report to their training camp in June of 1971, but they insisted that he sign the contract. When he continued in his refusal to sign, they told him he would have to leave the camp. On July 16, 1971, Kapp left the Patriots' training camp and severed his ties to this club, although the Patriots did retain him on their reserve list until 1972. Pursuant to a grievance procedure instituted by the member clubs after Kapp's departure, Rozelle reaffirmed his previous decision that Kapp was required to sign a Standard Player Contract as a condition of his participation in professional football.

After a lengthy trial, the jury found that Kapp could not prove he had been damaged by the general illegality of the rules used by the NFL. A verdict was returned against Kapp on all issues upon which he sought relief. Kapp's appeal from the trial findings focuses primarily on the court's instructions to the jury. He claims they erroneously stated the law to his prejudice.

I

Kapp's major contention is that the instructions did not direct the jury to find damages based solely on the fact the antitrust laws were violated. The contextual setting of this case has all

the appearances of a group boycott of the type condemned as *per se* unlawful in *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). But that fact alone does not automatically give rise to damages. Section 4 of the Clayton Act, 15 U.S.C. § 15, requires proof of injury.[2] *E.g., In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 125-26 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973). The court properly instructed the jury that there must be a causal relationship between the illegality, if any, and the injury if proved.[3]

The requirement of cause and effect or "impact" was not new in this litigation when the jury instructions were proposed. In the pretrial order of February 12, 1976, before trial set for February 23, 1976, the court advised all counsel that the impact of the NFL's alleged unlawful rules would have to be shown.

The district court's approach to this issue was proper. The mere fact that some of the NFL's rules were found violative of the antitrust laws does not automatically produce damages for Kapp. He must prove that he was injured "by reason of" one of the unlawful practices. *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, supra.* The Supreme Court has recently ruled that the only damages recoverable in an antitrust suit are those which occur by reason of that which made the defendant's actions unlaw-

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2. "Any person *who shall be injured* in his business or property *by reason of anything* forbidden in the antitrust laws . . . ." 15 U.S.C. § 15 (Emphasis added).

3. Jury instruction 5 read:
"5. From what I have said thus far, you will note that the main issue of fact which you are to decide in connection with this antitrust claim is whether, assuming, as you must, the illegality of the NFL constitution and bylaws in the respects adjudged by the Court, plaintiff has sustained injury to his business which can be said to have been proximately caused by reasons of such combination of defendants, and if so, the amount of damages, if any, in terms of money by him sustained." R.T. 3403.

ful. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977):

> "Plaintiff must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anti-competitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.' *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. at 125."

Even accepting that the restraints imposed by the challenged rules were unlawful under the Sherman Act, a jury question still remains as to whether, under the Clayton Act, those unlawful restraints were the cause of any loss Kapp may have suffered through his failure to play for the Patriots. The defendant's theory as argued to the jury was that for personal reasons of his own Kapp had decided to discontinue playing football, that he had decided to seek less strenuous employment in the entertainment field, that his only interest in professional football now lay in attempting to recover threefold any financial loss he may have suffered through his election not to play.

That Kapp's principal concern was not with the ability to play professional football free from the restraints imposed by the rules is strongly suggested by the fact that he was urged by both the Patriots and the League to sign a Standard Player Contract with the right reserved to challenge the rules should they be applied against him in the future.

II

The NFL has filed a cross-appeal from the summary judgment of the district court holding the challenged rules to have violated the antitrust laws. It contends that summary judgment was premature since controverted factual issues (including the application of the labor exemption to the contested provisions) remained to be resolved by trial.

Our holding on Kapp's appeal is that even if the challenged rules violated the Sherman Act, Kapp did not prove damage under the Clayton Act. Such a holding makes it unnecessary for us to reach the issue presented by the cross-appeal. By upholding the jury verdict, our holding also serves to eliminate any harm the NFL may have suffered by virtue of the summary judgment and to deprive the NFL of its standing as grievant. Thus, the appeal in effect has been rendered moot. *See Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939); *Lindheimer v. Illinois Tel. Co.*, 292 U.S. 151 (1934).

On Kapp's appeal judgment is affirmed. The appeal of the NFL is dismissed.

Appendix B

United States Court of Appeals
for the Ninth Circuit

JOSEPH R. KAPP, Plaintiff-Appellant, v. NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al., Defendants-Appellees.	No. 76-2849
JOSEPH R. KAPP, Plaintiff-Appellee, v. NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC., Defendant-Appellant,	No. 76-2878
JOSEPH R. KAPP, Plaintiff-Appellee, v. NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al.,	No. 76-2879

The opinon filed August 4, 1978, shall be amended as follows:

Beginning at Part II, Slip Opinion at p. 2516, l. 10 the opinion will read:

"II

Kapp also challenges the manner in which the jury was instructed regarding his contract and tort claims against the Patriots and the NFL. He argues that the jury was impermissibly allowed to decide whether a contract actually existed between himself and the Patriots, claiming this was a matter of law for the court to decide. But, whether a contract exists is a matter of law only when the facts are undisputed. *Bell v. Ralston Purina Co.*, 257 F.2d 31 (10th Cir. 1958). Here, the intention of the parties as to whether the terms of the initial agreement would be incorporated into the Standard Player Contract was in dispute. In this circumstance, it is for the jury to decide whether a contract exists. *Osborn v. Boeing Airplane Co.*, 309 F.2d 99, 103 (9th Cir. 1962). In that regard, the court instructed on both the contract claims and the tort claims.[4] These instructions properly stated the legal principles from which the jury could make its decision. The jury by its verdict found against the plaintiff and for the defendants, not only on the contract claims but also on the tort claims.

"4. As to the contract claims, the court said, in part:

'You may take—put it this way: On the issue of the terms and meaning of the 10-6-70 memo contract, I instruct you that the burden rests upon the plaintiff to prove, not only the existence of that agreement, but its terms as intended by both parties, within the meaning of my instructions.

'Therefore, if you find from the evidence in this case that, although neither party mentioned the matter of signing a Standard Player Contract during the negotiations for the memo agreement, and although such—no such matter appears in the written memo agreement, it was, nevertheless intended and assumed by both parties that, in light of usage and customary practice within the meaning of my instructions,

plaintiff was to sign also the Standard Player Contract, then plaintiff would have been contractually bound to sign the Standard Player Contract; and since he refused to do so, he could not, if you so find, recover against the Patriots on his contract claim in this case.

'On the other hand, if you find from the evidence that this October 6th, '70 memo agreement—that the signing of that—that the signing of a Standard Player Contract by the plaintiff was not within the intent of the parties, then, of course, the Patriots would be in breach of the 10-6-70 memo agreement by requiring plaintiff to so sign a Standard Player Contract as a condition of Patriots' further performance of that contract, or that memo agreement; and plaintiff would be entitled on such findings to recover on his contract claim against the Patriots the balance that he would have been paid under the memo agreement.' R.T. at 3774-75.

'As to the tort claims the court defined the nature of the alleged tort claims and instructed in pertinent part:

'Now, if you should find from the evidence, considered in the light of these instructions, in favor of the plaintiff on his claim against all the defendants, other than the Patriots, of wrongful interference with his contractual or business relationships with the Patriots, you may award such damages against the defendants; that is, such of them as are so found to have wrongfully so interfered, and you can award such damages as you find were proximately caused as a result of such defendant's wrongful inducement or interference, including, in this kind of an award, in addition to any loss of expectable earnings by the plaintiff, such damages for mental suffering, if any, as was so proximately caused to the plaintiff.' R.T. 3780-81."

III

The NFL has filed a cross-appeal . . . ."

The full court has been advised of the proposal to amend the opinion, and of the suggestion for en banc rehearing, and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed.R.App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. The opinion filed August 4, 1978, is amended as set forth above.

TO BE PUBLISHED

Appendix C

Joseph R. KAPP, Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al., Defendants.

No. C-72-537 WTS.

United States District Court, N. D. California.

MEMORANDUM OF DECISION

SWEIGERT, District Judge.

THE RECORD

Plaintiff Joe Kapp, once an All-American (1958) for the University of California Bears, later a Professional quarterback of considerable renown in the Canadian League (1959-1966) and with the Minnesota Vikings (1967-1969) and finally a quarterback for the New England Patriots (1970), brings this suit against the defendants National Football League (NFL), its Commissioner Pete Rozelle and its 26 member professional football clubs and other related defendants, alleging antitrust conspiracy and monopoly among defendants, whereunder defendants in July, 1971, caused his discharge by the New England Patriots with which he claims to have had an October 6, 1970 contract to play for the 1970, 1971 and 1972 seasons for a stated compensation of $600,000, alleging, further, that defendants, in effect, drove plaintiff out of professional football in the United States.

Plaintiff further alleges, as a breach of contract cause of action brought under the pendent and/or diversity jurisdiction of this federal court, that defendant Patriots breached its contract of

October 6, 1970, and that the other defendants herein tortiously induced that breach of contract.

The case is now before the Court upon plaintiff's motion for a summary judgment declaring that, upon the evidentiary record now before the Court and as a matter of law, defendants have violated Sections 1 and 2 of the Sherman Act to plaintiff's injury in his person and property and, further, that defendant Patriots has breached its contract with plaintiff and, further, that all defendants herein wrongfully induced that breach.

The record before the Court, as presented by plaintiff, consists, in addition to the complaint and the answers, of certain depositions on file (of Rozelle, Kensil, Finks, Klosterman, Kapp, Cook, Ridder, Winter, Sullivan); an affidavit of Rozelle (2/17/73); admissions of defendants in response to plaintiff's requests and certain answers to interrogatories by defendants Vikings and Raiders. This record has been supplemented by defendants' affidavits of Sullivan, Kheel and Retzlaff.

THE FACTS

The facts which appear from this record without dispute (except as may be otherwise expressly noted) are substantially as follows:

While Kapp was with the University of California and a prospective professional player, the Washington Redskins "drafted" him pursuant to a so-called "selection" or "draft" rule, embodied in the NFL Constitution and By-Laws, Section 14.3(A) and 14.5, providing that at a Selection Meeting of the NFL Clubs, held annually in January or February, each club participating therein can select prospective players of its own choice; the selecting club will have the exclusive right to negotiate for the services of each player selected by it and placed on its Reserve List—even if the selecting club's offer to the prospective player might be unacceptable and even if the selecting club makes no offer at all, no other

league club may negotiate with him without the consent of the selecting club.

The NFL Constitution and By-Laws, Section 9.2 also contains a so-called "tampering" rule which provides that if a member club shall tamper, negotiate with or make an offer to a player on the active, reserve or selection list of another club, then the offending club, in addition to being subject to all other penalties provided in the NFL Constitution and By-Laws, shall lose its selection choice in the next succeeding selection meeting in the same round in which the affected player was originally chosen and, if such offense was intentional the Commissioner shall have power to fine the offending club and may award the offended club 50% of the amount of the fine imposed by the Commissioner.

When the Washington Redskins made no satisfactory offer to Kapp, he went to the Canadian Football League and played there for seven years (1959-1966) during which period the Redskins kept him on their reserve list until April, 1966 and thus barred other NFL Clubs from negotiating with him.

Kapp's last Canadian contract expired after the 1966 season, subject to an option of his Canadian team to renew his contract for 1967—an option which was exercised. The Canadian Club, however, then suspended Kapp because of his covert negotiations, during December, 1966, with the Houston Oilers of the then American Football League.

Those negotiations had resulted in a contract between Kapp and the Oilers, dated February 10, 1967, whereunder Kapp was to be paid a $10,000 bonus to report to Houston in 1967 if his Canadian team did not exercise its option and, if it did, then he was to report to Houston in 1968 and play for two years at a salary of $100,000 a year.

On April 12, 1967, the Kapp-Oiler contract was declared invalid by NFL Commissioner Rozelle and by the then President of the AFL, acting together, according to plaintiff, pursuant to

an understanding between the NFL and the Canadian League that players would not be permitted to contract during their contract periods for moving from one league to another.

Although Kapp still preferred to play for the Oilers, he eventually obtained clearance to play for the Minnesota Vikings when the latter paid Kapp's Canadian team $50,000 for his release and (apparently) made satisfactory arrangements with the Washington Redskins for any claim they might have. Kapp's contract with the Vikings, dated September 3, 1967, was for the 1967-1968 seasons with an option to have him also in 1969 for a total compensation of $300,000.

Kapp played with the Vikings during 1967 and 1968; the Vikings then exercised their option for a third year, 1969, during which Kapp contributed considerably to the Vikings' NFL championship and participation at the Super Bowl.

The Vikings offered Kapp a contract for another two years upon the same compensation terms but Kapp declined to sign. Other clubs, needing a quarterback of Kapp's ability, expressed interest—the Philadelphia Eagles and the Houston Oilers—but neither club followed up with an offer.

According to plaintiff, this was because those teams were restrained by the so-called "Ransom" or "Rozelle" rule which, as embodied in the NFL Constitution and By-Laws (Sec. 12.1(H)), provides that no league club will employ a player even if he has become a free agent by playing out his contract (as did Kapp) unless the new employing club either makes satisfactory arrangements with the former employing club, or, absent such satisfactory arrangements, employs the player subject to the power of the NFL Commissioner to name and award one or more players to the former club from the active reserve or selection list of the acquiring club as the Commissioner in his sole discretion deems fair and reasonable.

Eventually, the New England Patriots, needing a quarterback of Kapp's abilities, sought assurances from the Minnesota Vikings concerning what they would require as a ransom in the event the Patriots employed Kapp. This resulted in a transfer agreement between the Vikings and the Patriots under which the Patriots surrendered to the Vikings the Patriots' first round of draft choice for 1972 and, in addition, their number-one draft selection of 1967.

Under these conditions the Patriots contracted with Kapp under date of October 6, 1970, for his services as a Patriot for the remainder of the 1970 season and for 1971 and 1972 at a total compensation of $600,000. (Defendants contend that there is some evidence in the record that this claimed contract was merely a memorandum intended by the parties to be effective only when Kapp signed a Standard Player Contract).

Nevertheless, Kapp played for the Patriots under that agreement for the remaining eleven games of the 1970 season and was paid $154,000 of the contracted amount.

In January, 1971, the Patriots, acting pursuant to the NFL Constitution and By-Laws and at the direction of the Commissioner, sent Kapp a form of Standard Player Contract but Kapp refused to sign it. This Standard Player Contract is required by the NFL Constitution and By-Laws, Sections 15.1 and 15.4, to the effect that all contracts between the clubs and players shall be in the form adopted by the member clubs of the league, each club to have the right to modify such standard contract but subject to the right of the Commissioner to disapprove any such modification which is in violation of the Constitution and By-Laws or if either contracting party is guilty of conduct detrimental to the league or to professional football.

The Standard Player Contract (Pars. 4, 6 and 11), so required, provides that the player becomes bound by the Constitution, By-Laws, Rules and Regulations of the league and of his club, including future amendments thereto and to the discipline of the club—subject only to the right to a hearing by the Commissioner whose decisions shall be final and unappealable.

The Standard Player Contract, Par. 10 also contains the so-called "option" rule which gives the employing club an unilateral option to renew the contract for a further term of one year at a reduced rate of compensation, i. e., 90% of the amount paid by the player in the previous year—the purpose of this rule being, according to plaintiff, to coerce the player to sign a new contract on the owner's terms under peril of having to serve another year at the reduced compensation.

On May 28, 1971, Commissioner Rozelle wrote to the Patriots reminding the club that Articles 17.5(B) and 15.6 of the NFL Constitution and By-Laws provide that no player may play in a game or practice with a member club unless an executed Standard Player Contract is on file with the Commissioner.

Kapp was permitted to report to the Patriots (1971) training camp and to take the physical examination and participate in team meetings and light workouts but, when he persisted in his refusal to sign the Standard Player Contract he was, in effect, told by the Patriots to leave.

In July, 1971, the defendant clubs instituted a grievance procedure against Kapp, pursuant to the NFL Constitution and By-Laws §§ 8.3, 8.5 and 8.13(F), complaining that he had refused to sign a Standard Player Contract and, upon reference of the grievance to Commissioner Rozelle for decision, the Commissioner, (Kapp failing to appear) reaffirmed his previous decision by ordering Kapp to sign a Standard Player Contract as a condition of eligibility to continue his participation in football activity on behalf of the Patriots or any other NFL Club.

The NFL Constitution and By-Laws (Art. VIII, §§ 8.3, 8.5 and 8.13(A)(F)), under which these grievance proceedings were conducted, provide in substance that the Commissioner shall in-

terpret the Constitution and By-Laws (8.5), shall have full, complete, and final jurisdiction of disputes between member clubs, disputes between players and disputes involving member clubs and players (8.3(e)); also to disapprove without a hearing, contracts between a player and a club executed in violation of or contrary to the NFL Constitution and By-Laws or detrimental to the league or the sport. (8.13(F)).

These powers of the Commissioner are acknowledged by any player who signs the Standard Player Contract. (See Section 11 thereof).

Even after Kapp's departure from the Patriots' training camp the Patriots retained him on their reserve list in the expectation that, under the so-called "Ransom" or "Rozelle" Rule, already above mentioned, the Patriots could claim a ransom if Kapp should sign with any other NFL Club.

Further facts shown by the record, bearing on the collective bargaining issue, will be separately hereinafter set forth when discussing that issue.

PLAINTIFF'S CONTENTIONS

Plaintiff contends that the foregoing rules contained in the NFL Constitution and By-Laws, i. e., the so-called "Draft" rule (NFL Constitution and By-Laws Sec. 14.3 and 14.5), the so-called "Tampering" rule (NFL) Constitution and By-Laws Section 9.2), the so-called "Option" Rule (Standard Player Contract, Par. 10), the so-called "Rozelle" or "Ransom" Rule (NFL Constitution and By-Laws Sec. 12.1(H)), the "Standard Player Contract" Rule (NFL Constitution and By-Laws, Sec. 15.1-15.4); and the rules vesting the power to make final interpretations and decisions in the Commissioner (Const. & By-Laws [Art. III, Sec. 8.3, 8.3(e), 8.5, 8.13(A), 8.13(F)]) constitute a combination among defendants to refuse to deal with players except under the above stated conditions—in effect a boycott or blacklist—and as such a per se violation of the Sherman Act.

Plaintiffs further contend that, apart from the *per se* rule, the combination is illegal even under the "rule of reason" because the restraint obviously goes far beyond what would be reasonably necessary to achieve the business goals involved, citing such cases as International Salt v. United States, 332 U.S. 392, 397-398, 68 St.Ct. 12, 92 L.Ed. 20 (1947); International Bus. Mach. v. United States, 298 U.S. 131, 139-140, 56 S.Ct. 701, 80 L.Ed. 1085 (1936); White Motor Co. v. United States, 372 U.S. 253, 271-272, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963); and, in the field of league sports, Denver Rockets v. All-Pro Mgt., 325 F.Supp. 1049, 1066 (C.D. Cal.1971).[1]

DEFENDANTS' CONTENTIONS

Defendants contend (1) that the rules contained in the NFL Constitution and By-Laws and in the Standard Player Contract, do not amount to a violation of the antitrust laws—certainly not to such a refusal to deal as would amount to a *per se* violation of Section 1 of the Sherman Act as contended by plaintiff, and (2) that, even if these rules might otherwise amount to an antitrust violation, all of these rules are now immunized from antitrust laws by having become since at least from February 1, 1970, the subject of, and the result of, collective bargaining between the NFL, as an employer, and the NFL Football Players' Association as the certified collective bargaining labor union representative of all NFL players.

Deferring consideration of defendants' asserted collective bargaining defense, we take up first the question whether the rules contained in the NFL Constitution, By-Laws and Standard Player Contract, amount to a violation of the Sherman Act *per se* or otherwise.

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1. Plaintiff, as already noted, also asserts a breach of contract cause of action against defendants—a subject which will be separately considered later in this memorandum.

THE ANTITRUST ISSUE— CONTENTIONS OF THE PARTIES

In support of his contention that defendants' rules amount to a per se violation of the antitrust laws, plaintiff cites and relies upon cases which we set forth in our Notes 2 and 3.[2]

[1] Defendant, recognizing that Radovich v. NFL, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957) has settled the matter, concedes that professional football league activity, unlike similar baseball activity, is subject to the anttirust laws.[3]

Defendant contends, however, that the rules here in question do not amount to an antitrust violation—certainly that they do not amount to a per se Section 1 violation, because, in any event, the antitrust legality of the questioned rules and activities would have to be tested by the "rule of reason."

In support of this contention, defendants argue that professional league sport activities, such as football, must be distinguished from other kinds of business activities which have been held to be per so antitrust violations; that league sports activities are so unique that the per se rule is inapplicable; that, although club teams compete on the playing field, the clubs are not, and indeed cannot be, competitors with one another in a business way because the very purpose of a professional sports league is to provide reasonably matched teams for field competition to attract and sustain the interest and patronage of the fans; that the success of the league as a joint venture of its clubs depends upon the ability of each club to do this; that, if each member club were allowed

2. For Notes 2 and 3 see Appendix.

3. This strange antitrust law distinction between professional baseball league and similar football activities originated in Federal Baseball Club v. National League, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922), which was followed by the Supreme Court in Toolson v. N. Y. Yankees, 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64 (1953) and adhered to in Flood v. Kuhn, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1971)—all holding baseball to be exempt.

by the league to engage in free-for-all competition for the best or better players, then the most strongly financed or otherwise better advantaged clubs would be able to sign up and monopolize the best or better players, leaving only average or mediocre players for the other clubs with the effect of destroying the evenly matched field competition that brings fans to the games.

For this reason, defendants say, there must be league agreements and rules which, restricting the freedom of the clubs to compete for players, impinge to some extent upon the freedom of players to choose their own clubs.

In support of their position defendants point out that the uniqueness of sports league activity in these respects has been long and widely recognized in the Congress,[4] in the Department of Justice,[5] and, indeed, by the football players, themselves, speaking through their Players' Association to the effect that each member club in the NFL has a direct economic stake in the successful operation of every other member club and that the players, therefore, support certain structural ingredients of the business—such as the draft and option clauses. (See our Note 6.)[6]

4. As to the Congress, defendants refer to the 1961 enactment of 15 U.S.C. §§ 1291-1294 exempting joint arrangements for club television rights from the antitrust laws; the 1964 reporting out by a Senate Committee of a bill exempting professional league sports in all its phases from antitrust; the 1958 sponsorship by then Senator John F. Kennedy of a bill that would have provided a substantially unqualified antitrust exemption for the player rules of all professional sports leagues, the Senator stating that these leagues are so unique that they cannot be treated in the same manner as other businesses; the 1966 enactment of 15 U.S.C. § 1291, authorizing merger of the American Football League with the National Football League.

5. As to the Department of Justice, defendants refer to a 1961 acknowledgment by the Department that professional league teams must have some joint agreements to assure continued functioning of leagues, that Congress has so indicated and that, therefore, investigation of NFL player transfer rules was unwarranted; also the 1971 similar acknowledgment that some activities, especially league sports, cannot exist without retraint of this kind.

6. For Note 6, see Appendix.

THE ANTITRUST ISSUE—CONCLUSIONS

[2] At the outset we note that, since the complaint and the record herein show without dispute that the claimed antitrust practices of the defendants are by their very nature directed at the players, including plaintiff, he has standing to sue under the Clayton Act Section 4 (15 U.S.C. § 15). (See Ostrofe v. H. S. Crocker Company, this court's No. 74 0090—WTS, decided 12/4/74, reviewing cases, including Radovich v. NFL, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957), an standing of employees to sue).

In *Radovich* the Supreme Court, reversing the District Court on the ground that professional football, unlike professional baseball, *is* subject to the antitrust laws, went on to examine the complaint which alleged, as in our case, a similar combination to in effect boycott any player violating rules designed to restrict the players signing with another club without the consent of the club holding his contract. The Supreme Court expressly recognized the complaint's sufficiency to give the plaintiff standing to proceed with his case under the federal antitrust laws (See pp. 453-454, 77 S.Ct. 390).

The record herein shows without dispute the involvement of interstate commerce. (See Lawrence Flood v. S. F. Forty-Niners, this court's No. C-72-1704 WTS, 7/9/74, citing Radovich v. NFL. supra, also on this point; also United States v. Int. Boxing Club, 348 U.S. 236, 241, 75 S.Ct. 259, 99 L.Ed. 290 (1955)).

We also note that there is no genuine issue as to any material fact bearing on the existence and nature of the challenged rules; they are all set forth in admitted agreements embodied in the NFL Constitution, By-Laws and Standard Player Contract.

However, since plaintiff contends that the challenged rules are illegal *per se*, while defendant argues for the test of *reasonableness*, we must now determine which test to apply in this case.

There is authority to the effect that combinations of the kind shown by the record here, constitute *per se* antitrust violations (See our notes 2 and 3, Appendix).

Under the holdings of those cases the combination here shown would be a per se violation of the antitrust laws.[7] In Washington State Bowling Assn. v. Pacific Lanes (Ninth Circuit) supra, (Note 3, Appendix) the Court applied the principle that in league sports activities all jointly enforced regulations, limiting the right of each club to deal with anyone it chooses and consequently limiting to some extent the players' free choice of employment, are *per se* illegal—regardless of whether the regulation is designed to promote the league sport rather than to constitute a boycott.

However, we are of the opinion that for reasons to be hereinafter set forth it is not necessary to rest our decision in this pending case on an application of the *per se* rule.

In the first place, there are cases which, recognizing the unique nature and purpose of sports league activities, hold (for reasons set forth in our Note 8,[8] and supra at pp. 79-80), that the *per se* rule is inappropriate and inapplicable to sports league activities. (See, mainly, Flood v. Kuhn, 316 F.Supp. 271, 273-276 (S.D.N.Y. 1970); see also *id.* 309 F.Supp. 793, 801 (S.D.N.H.1970) and Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F.Supp. 462 (E.D.Pa.1972).

The history of federal Executive (See our Note 5, supra), and Congressional (See our Note 4, supra), interpretation of the antitrust laws, as they relate to sports league activities, seems to accord with the reasoning of the cases last above referenced.

It may also be noted that suits brought by player-employees against sports league club-employers, are different from the more typical antitrust suits, brought by persons or firms claiming to have

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7. For example, a league enforced "draft" rule—Denver Rockets v. Mgt. Assn., supra, Note 2 in Appendix; (also Anderson v. Shipowners Assn., supra, Note 2, Appendix); a league enforced option rule—Boston v. Cheevers, supra, Note 3, Appendix; a league enforced reserve clause in a Standard Player Contract—Gardella v. Chandler, supra, Note 3, Appendix; a league sole discretionary suspension rule—Blacock v. Ladies Golf Assn., supra, Note 3, Appendix.

8. For Note 8, see Appendix.

been injured in their business or property as a result of defendants' anti-competitive practices, e.g., cases in which it has been held that agreements among competitors to fix prices, allocate territories, rig bids and, ordinarily, agreements to refuse to deal, constitute *per se* antitrust violations.

In our pending case and in similar cases the only alleged anti-competitive practice, is joint cub enforcement, through the league, of player-employee contracts whereunder the player agrees to accept and the clubs agree among themselves to enforce certain restriction on the players' right to freely pursue his trade with other club-employers and the clubs yield to that extent their free choice to employ.

[3] There is a well-settled rule of contract law that employer-employee contracts, restricting an employee's right to freely pursue his trade, may be illegal as against public policy *if, but only if,* the restraint is *unreasonable,* taking into consideration the nature of the business, the duration of the restraint, the area in which it operates, the situation of the parties and all circumstances bearing on whether the restriction is such only as to afford fair protection to the interests of the employer without imposing such an undue hardship on the employee as to interfere with the *public interest.* (See 17 C.J.S. Contracts (illegality of) §§ 238-258).

[4] We have in mind, of course, that when two or more club employers agree through league rules that individual player-employees, who violate such individual club-employee contracts will be in effect boycotted by *all* member club-employers, the situation goes beyond mere employer-employee contracting and falls within the antitrust law *per se* prohibition of *combinations* not to deal—even though the reasonableness test would have been applicable to the individual player contract.

It is arguable, however, that in this unique field of sports league activities (wherein to achieve fairly evenly matched teams on the field, there must be some degree and kind of restriction on the

right of clubs to hire and players to sign as they please) the test of legality of league rules for that purpose should be the same test, i. e., reasonableness test, as would be applicable to the individual player-club contract.

A further argument for preferring the reasonableness test is the existence of the player-employee/club-employer relationship—a relationship which lends itself to collective bargaining. Application of the absolute antitrust *per se* rule to *all* league rules enforcing restrictions upon the players' free choice of employment tends to preclude collective bargaining negotiations for league enforcement of some rules in this category which, considering the unique nature and purpose of league sports, may be regarded by both players and clubs as reasonably necessary in furtherance of their long-range *mutual* interests.

[5] For the foregoing reasons we conclude that in this particular field of sports league activities the purposes of the antitrust laws can be just as well served (if not better served) by the basic antitrust reasonabelness test as by the absolute *per se* test sometimes applied by the courts in other fields.

[6] In applying the reasonableness test we have in mind that the issue of reasonableness is ordinarily in such genuine dispute that a case cannot be resolved on a motion for summary judgment and must go to full trial of that issue.

However, in the present case, league enforcement of most of the challenged rules is so patently unreasonable that there is no genuine issue for trial.

[7] The "Ransom" or "Rozelle" rule, provides in effect that a player, even after he has played out his contract under the option rule and has thereby become a free agent, is still restrained from pursuing his business to the extent that all league members with whom he might otherwise negotiate for new employment are prohibited from employing him unless upon consent of his former employer or, absent such consent, subject to the power of the NFL

Commissioner to name and award one or more players to the former employer from the active reserve or selection list of the acquiring club—as the NFL Commissioner in his sole discretion deems fair and reasonable.

A conceivable effect of this rule would be to *perpetually* restrain a player from pursuing his occupation among the clubs of a league that holds a virtual monopoly of professional football employment in the United States.

We conclude that such a rule imposing restraint virtually unlimited in time and extent, goes far beyond any possible need for fair protection of the interests of the club-employers or the purposes of the NFL and that it imposes upon the player-employees such undue hardship as to be an unreasonable restraint and such a rule is not susceptible of different inferences concerning its reasonableness; it is unreasonable under any legal test and there is no genuine issue about it to require or justify trial.

Similarly, the draft rule (Sec. 14.-3(A), 14.5) is also patently unreasonable insofar as it permits virtually *perpetual* boycott of a draft prospect even when the drafting club refuses or fails within a reasonable time to reach a contract with the player.

Similarly, the so-called "one-man rule" (Const. & By-Laws, Art. VIII, Sec. 8.3, 8.3(e), 8.5, 8.13(A), vesting final decision in the NFL Commissioner, is also patently unreasonable (particularly where considered in the light of principles of *impartial* arbitration embodied in the Federal Arbitration Act, 9 U.S.C. § 1-14, and underlying the decision of the Supreme Court in Commonwealth Corp. v. Casualty Co., 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968), insofar as that unilateral kind of arbitration is used to interpret or enforce other NFL rules involving restrictions on the rights of players or clubs to free employment choice.

Similarly, the tampering rule (Const. & By-Laws, Sec. 9.2) and the Standard Player Contract rule (Const. & By-Laws, Secs. 15.1 and 15.4) are also patently unreasonable insofar as they are used to enforce other NFL rules in that area.

[8] The Option Rule, which appears only in the Standard Contract (Par. 10), gives the club an option for one additional year of service at 90% of the contract salary unless otherwise agreed. Since NFL rules leave the matters of duration and salary to free negotiation between players and clubs, this lone prescribed option provision cannot be said to so extend the original term and salary as to render it patently unreasonable; its legality cannot, therefore, be determined on summary judgment.

However, it is not necessary to hold that NFL league enforcement is illegal as to *all* restrictive employment or tenure rules; it is sufficient if we can determine on summary judgment the illegality of league enforcement of one or more such rules to the detriment of plaintiff.

It remains, therefore, only to determine whether NFL enforcement of the rules which we have held to be patently unreasonable and illegal can be deemed to have been the cause or at least one of the causes of injury to plaintiff.

We have in mind that the record here shows that the immediate cause of plaintiff's discharge by the New England Patriots was his refusal to comply with demands that he sign the Standard Player Contract.

However, as already explained, signing of the Standard Player Contract (including its paragraphs 4, 5 and 6) would bind a player to the whole NFL Constitution and By-Laws which, in turn, include the rules herein held to be illegal.

As already indicated, we are mindful that it may be held on review that application of the *per se* test renders NFL enforcement illegal as to *all* restrictive employment or tenure rules regardless of reasonableness for sports league purposes. If so, such holding could be made on the present record without trial or further proceedings.

THE COLLECTIVE BARGAINING ISSUE—CONTENTIONS OF THE PARTIES

The facts on this issue, as shown by the record, are substantially as follows:

As early as 1956 the NFL players formed a Players' Association and, although the Association was not then certificated by the NLRB, it did negotiate with the clubs through the NFL on many matters of interest and value to the players.

In 1968, the Players' Association received official recognition from the NLRB as a labor organization, i.e., a union within the meaning of NLRA, 29 U.S.C. Sec. 152(5), and as such the exclusive bargaining representative of all NFL players within the meaning of the NLRA, 29 U.S.C. § 159(a). The Players' Association has ever since negotiated with the NFL in the exercise of its power and mandatory duty, as such a representative, to bargain with the club-employers through the NFL, concerning wages, hours and other terms and conditions of employment.

As the result of that collective bargaining, two formal collective bargaining contracts have been executed—one in 1968 between the Association and the then 16 club NFL for the two-year term 1968-1970 and the second, dated June 17, 1971 (but by its terms made retroactive to February 1, 1970—the date of expiration of the previous contract) with the 26 members of the expanded NFL for the term February 1, 1970 through January 30, 1974.

This 1970-1974 Collective Bargaining Contract contained for the first time a provision (Art. III, § 1 of the 1970 contract) to the effect that "All players in the NFL shall sign the Standard Player Contract which shall be known as the 'NFL Standard Player Contract' " and that "The Standard Player Contract shall govern the relationship between the clubs and the players, except that this agreement shall govern if any terms of the Standard Player Contract conflict with the terms of this agreement. No amendments to the Standard Player Contract affecting the terms

and conditions of employment of NFL players shall be effected without the approval of the NFLPA, subject, however, to the right of the player and his club to agree upon changes in his contract consistent with this agreement."

As already noted, the Standard Player Contract contains the option rule (Par. 10) and also provides (Pars. 4, 6 and 11) that the player becomes bound by the Constitution, By-Laws, Rules and Regulations of the NFL and of his club, including future amendments thereto, and to the discipline of the club—subject only to the right to a hearing by the Commissioner whose decisions shall be final and unappealable.

Thus, the June 17, 1970 Collective Bargaining Contract provision (Art. III Sec. 1) requiring players to sign the Standard Player Contract, in effect binds the players who sign the Standard Player Contract to *all* the rules challenged by plaintiff in this case.

Since February 1, 1974, the expiration date of the 1970-74 Collective Bargaining Contract, the Players' Association and the NFL have been unable to agree on a new contract. Negotiations were commenced in early 1974; on July 1st the Association called a strike against the NFL as a means of enforcing their demands which included, in addition to the usual issues of wages, hours and working conditions, certain so-called "freedom issues." The strike lasted until August 19th when the Association announced a cooling period and allowed its members to report to their respective training camps, reserving, however, the right to call another strike unless agreement is reached on a new contract.

Defendants contend that all the rules here challenged by plaintiff have been the result of the collective bargaining embodied in the 1970-1974 Collective Bargaining Agreement between the NFL and the Players' Association (of which plaintiff was a member), as exclusive bargaining agent for all NFL players; that since a labor union, duly certified by the NLRB as exclusive bargaining agents for employees, has authority to bind employees,

the provisions of that Collective Bargaining Contract cannot be challenged by plaintiff, an employee thus bound, citing NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 87 S.Ct. 200, 18 L.Ed.2d 1123 (1967), holding that employees are bound by the agreements made by their collective bargaining agents even though individual employees may feel such agreements adversely affect them; that Art. III, Section 1 of the 1970-1974 Collective Bargaining Contract requires players to sign the Standard Player Contract, which in turn binds them to the option rule (contained in Par. 10) and (Pars. 4, 5, 6) to all the other rules contained in the NFL Constitution, By-Laws and Regulations.

Defendants contend that, since all of the rules have been in this manner accepted by the players, through their association, asa result of collective bargaining, the rules are exempt from the antitrust laws even if otherwise they would be in violation thereof, citing and relying on the cases which we briefly describe in our Note 9.[9]

Plaintiff, responding to defendants' asserted collective bargaining defense, contends (1) that these collective bargaining agreements, especially the contract of June 17, 1971, containing the requirement that players sign the Standard Players Contract insofar as they contain, expressly or by reference, the various agreements and rules herein challenged, are not exempt from the antitrust laws by the collective bargaining process, citing and relying on such cases as are cited and briefly discussed in our Note 10;[10] (2) that in any event the collective bargaining agreement, dated June 17, 1971, which by its terms was made retroactive to February 1, 1970, could not retroactively affect the plaintiff's contract with the New England Patriots which, as already noted, was dated October 6, 1970, eight months before execution of the June 17th collective bargaining contract, citing Philadelphia

9. For Note 9, see Appendix.

10. For Note 10, see Appendix.

World Hockey Club, Inc. v. Philadelphia Hockey Club, 351 F.Supp. 462 (E.D.Pa. 1972); Goodin v. Clinchfield Ry. Co., 125 F.Supp. 441 (E.D.Tenn.1954).

On this latter point defendants reply that the 1970-1974 collective bargaining contract, atlhough dated June 17, 1971, was merely a formalization of an interim agreement reached by the Association and the NFL on August 3, 1970 (also made retroactive to February 1, 1970) but not finally formalized until June 17, 1971.

(3) Plaintiff also contends that the Collective Bargaining Agreement provision, Art. III, Section 1, insofar as it purports to bind players to NFL rules calling for unappealable decision of the Commissioner (e.g., NFL Constitution, By-Laws, Art. III, Secs. 8.3, 8.3(e), 8.5, 8.13(A)(1), 8.13(F)) must be held inoperative because (1) antitrust violations are not subject to arbitration, and (2) such arbitration by the NFL Commissioner would be a denial to the players of due process.

COLLECTIVE BARGAINING ISSUE—CONCLUSIONS

The problem of the extent to which collective bargaining may immunize union-employer agreements in professional sports league activities from the antitrust laws has been recognized by the Supreme Court only to the extent that Marshall J., dissenting in Flood v. Kuhn, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1971) from the majority holding that baseball is exempt from antitrust, went on to observe, at pages 293-296, 92 S.Ct. 2099, that even if baseball was subject to antitrust there would still remain the issue of the effect of collective bargaining. He pointed out that, although the court had decided cases involving union management agreements working to the detriment of management's competitors, the court had not dealt with a situation in which the collective bargaining agreement is claimed to work to the detriment of labor—as in our pending case; he raised the question whether there would be exemption from the antitrust

laws if it were shown that collective bargaining acceptance of the reserve system had been "thrust upon," rather than freely accepted by, the players' union; also raised was the question as to "the limits to the antitrust violations to which labor and management can agree."

The earlier cases cited by Justice Marshall in Flood v. Kuhn, supra, are included in our Note 10 (Appendix).

It may be noted, however, that in Radovich v. NFL, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957), the Supreme Court rejected, without squarely facing the issue, a claim that federal labor statutes governed the relationship between a professional athlete and professional sport.

[9] Whatever may be the immunizing effect of collective bargaining upon otherwise illegal restraints of trade in league sports (See 81 Yale Law Journal 1 (1971-72)), it is not necessary to rest the decision of the pending case upon any such point of law because in this case the record shows that there was no such collective bargaining contract.

Defendants rely on the Collective Bargaining Contract, dated June 17, 1971 (but by its terms made retroactive to February 1, 1970) for their contention that the NFL Constitution and By-Laws, Secs. 15.1 and 15.4, requiring players to sign the Standard Player Contract (with all that implies), had been in effect accepted by plaintiff, through the Players' Association and incorporated into that Collective Bargaining Contract (Par. 10) after and as the result of collective bargaining. (See our Note 11.)[11]

The record shows, however, that it was between January and May 28, 1971 that defendants, acting through the NFL Commissioner, brought their pressure to bear on plaintiff to sign a Standard Player Contract as a condition of remaining with the

11. For Note 11, see Appendix.

Patriots. It was on May 28th that the Commissioner wrote the Patriots to the effect that no player could play in a game or even practice with a member club unless an executed Standard Contract was on file with the Commissioner. The Collective Bargaining Contract of June 17th containing for the first time such a requirement, had not then been executed.

The Patriots allowed Kapp to remain at training camp after May 28th only with the expectation that he would comply with the condition. When he failed to do so, the Patriots, pursuant to NFL pressure, told him to leave and he did eventually leave on July 15, 1971.

Further, according to the record, no claim was ever communicated by the NFL to plaintiff during the January-May 1971 period that the requirement for signing a Standard Player Contract was based on the existence of any collective bargaining agreement—only that such was required by the NFL Constitution and By-Laws. Yet, it was the pressure exerted during that period by the NFL upon the Patriots and in turn by the Patriots upon plaintiff that led to his discharge by the Patriots and to the eventual formality of grievance procedures brought by NFL against him in absentia, in July, 1971. Defendants may not now assert that the Collective Bargaining Contract of June 17, 1971, retroactively justifies their earlier ouster of plaintiff.

[10] Further, even if the NFL Standard Player Contract requirement had been accepted through collective bargaining, there would still remain the question, well put by Marshall, J. in *Flood, supra,* as to what are "the limits to the antitrust violations to which labor and management can agree." We are of the opinion that, however broad may be the exemption from antitrust laws of collective bargaining agreements dealing with wages, hours and other conditions of employment, that exemption does not and should not go so far as to permit immunized combinations to enforce employer-employee agreements which, being unreason-

able restrictions on an employee's right to freely seek and choose his employment, have been held illegal on grounds of *public policy* long before and entirely apart from the antitrust laws.

We conclude, therefore, that upon the record before us it appears with no genuine dispute as to any material fact that the NFL Standard Contract Rule (NFL Const. & By-Laws, Sec. 15.1 and 15.4) under which plaintiff was discharged from his employment, had not been contractually accepted, had not been contractually accepted by plaintiff or the Players' Association as the result of collective bargaining.

It is unnecessary to decide the further question whether collective bargaining contracts, insofar as they bind members of a union to employer enforcement of individual contract restrictions upon the employee's right to pursue his trade with other employers, really fall within the NLRA requirement for collective bargaining concerning "wages, hours and other terms and conditions of employment."

Further, it becomes unnecessary to decide the issue whether the claimed Collective Bargaining Contract of June 17, 1971, even if otherwise applicable, was the result of genuine collective bargaining or was (to use the words of Marshall, J. in *Flood*, supra) "thrust upon" the players and their Association by the league—as was the claimed collective bargaining contract in Philadelphia World Hockey Club v. Philadelphia Hockey Club (See our Note 10).

THE BREACH OF CONTRACT ISSUE

Nor is it necessary to rule at this time upon plaintiff's pendent breach of contract count against defendant Patriots, including charges of tortious inducement of such breach by all defendants —a count which may involve some genuine issues of material fact and, therefore, requiring trial—along with the issue of damages consequent upon any breach of contract.

ORDER

For the above reasons, the plaintiff's motion for summary judgment should be and hereby is granted in part in accordance with the views set forth herein.

Plaintiff shall forthwith prepare, pursuant to Local Rule 123, a proposed form of judgment consistent with the views herein expressed.

APPENDIX

Note 2

In support of his per se violation contention plaintiff cites and relies on Anderson v. Shipowners Assn. of the Pacific Coast, 272 U.S. 359, 47 S.Ct. 125, 71 L.Ed. 298 (1926)—an agreement among shipowners through their Association to control the employment of seamen, i. e., that no seaman could obtain employment without registering with the Association, receiving a number and awaiting his turn to accept a job as offered or none at all; Paramount Famous Lasky Corporation v. United States, 282 U.S. 30, 51 S.Ct. 42, 75 L.Ed. 145 (1930), an agreement among film distributors to do business with exhibitors only through a Standard Exhibition Contract governing license terms, scheduling and submission of all controversies to a board of arbitration; Fashion Originators' Guild of America, Inc. v. F. T. C., 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941)—an agreement among members of a style designers guild not to sell their creations to "style pirates;" Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959)—an agreement among retail stores not to deal with certain traders; United States v. Hilton Hotels Corporation, 467 F.2d 1000 (9th Cir. 1972)—an agreement among hotels to give preferential treatment to suppliers who paid dues to an association formed by the hotels to attract conventions to their city—held a per se violation of the antitrust laws.

Note 2(a)

As instances of specific application of this per se rule to sports league activities plaintiff cites: Washington State Bowling Prop. Assn. v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir. 1966) an agreement among defendants conducting bowling tournaments, to restrict their league and tournament bowling to members of certain associations; Denver Rockets v. All-Pro Management, Inc., 325 F.Supp. 1049 (C.D.Cal.1971)—an action by a basketball player to enjoin the National Basketball Association from enforcing by-laws prohibiting players from negotiating with any league within a fixed period, held that the clause constituted a group boycott in violation of the antitrust laws and, as such, was illegal per se; Boston Professional Hockey Assn. Inc., v. Cheevers, 348 F.Supp. 261 (D.C.Mass.1972)—a one-year option [illegible]e held a per se violation of the antitrust laws; Blalock v. Ladies Professional Golf Assoc., 359 F.Supp. 1260 (N.D.Ga.1973)—a suit brought by a suspended member against the Association, held that a rule under which plaintiff was suspended in the unfettered discretion of the Association was a per se violation of the antitrust laws; Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949)—a suit by a baseball player, involving the "reserve" clause in players standard contract—held complaint sufficiently alleged restraint on interstate commerce and case remanded for trial.

Note 6

Defendants refer to the claimed 1968 statement of a former president of the AFL Players' Association to its members stating that pro-football must remain competitive if it is to attract the consumers of our entertainment product—the fans; that the history of professional sports clearly records the economic fact of life that tight pennant races attract the biggest following and to this end we support certain structural ingredients of our business —such as the draft and the option clause; also to a claimed 1970

statement of the NFL Players' Association to the effect that the NFL, as a business enterprise is unique in many respects—it is volatile, with disparity between member clubs with regard to both monetary rewards and successes on the field of play and, due to many factors, including a unique * * *

In Bodine v. United Farm Workers, supra, an antitrust suit brought by growers against the farm workers union, the Ninth Circuit, considering at length the circumstances when a union may transgress the antitrust laws, held that, although union activities are for the most part exempt from the antitrust laws, the exemption is not absolute and that a complaint, alleging a union combination with others, including non-labor groups, to boycott de-defendants' grapes in restraint of trade was sufficient to state a cause of action.

Note 10

In support of his contention that collective bargaining does *not* immunize antitrust activity plaintiff cites such cases as Allen Bradley Co. v. Local No. 3, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945); United States v. Women's Sportswear Assn., 336 U.S. 460, 69 S.Ct. 714, 93 L.Ed. 805 (1949); United Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), wherein employer-union agreements have been held not to be immune from the antitrust laws notwithstanding their inclusion in collective bargaining contracts; also Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F.Supp. 462, 496-500 (E.D.Pa.1972) and Boston Professional Hockey Assn. v. Cheevers, 348 F.Supp. 261 (D.Mass.1972)—although in these last two cases the rulings on this point were really to the effect that the agreements between the league clubs and players were not sufficiently shown to have been arrived at through collective bargaining.

Philadelphia World Hockey v. Philadephia, supra. (already referred to in our discussion of the antitrust issue, see Note 8)

was an action by a newly formed professional hockey league antitrust injunction against an established league whose players were beset by reserve clause contracts. The case (pp. 498-499), dealing with defendants collective bargaining defense and act reviewing *Hutcheson, Allen Bradley, Pennington* and *Jewel Tea,* held that the Players' Association was not shown to have been certified by NLRB as the players' bargaining agent and, therefore there was no recognized collective bargaining in that case. The court, however, went on to state that, even if there had been, the collective bargaining contract would not immunize antitrust conduct because the record showed that the bargaining had not been serious, extended and at arms length concerning a reserve system which had been used by the league for many years prior to formation of the Players' Association which persistently but unsuccessfully sought to revamp the system; further that, even if there had been such serious bargaining it would not shield the league from antitrust liability in a suit by a third party competitor, i. e., a new league seeking access to players controlled by the league.

Note 11

Defendant's contention that an interim collective bargaining agreement between the Association and the NFL, including a Standard Contract requirement, had been reached between the parties in July and August, 1970, but that the final execution of that accord was delayed until June, 1971, and was, therefore, a mere formality, is so vaguely supported by the record herein that any issue of fact on that point, even if material for the decision of this case, would not be a genuine issue within the meaning of Rule 56, Fed.R.Civ.P.

Appendix D

United States Court of Appeals

JOSEPH R. KAPP,
Plaintiff-Appellant,

v.

NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al.,
Defendants-Appellees.

JOSEPH R. KAPP,
Plaintiff-Appellee,

v.

NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC.,
Defendant-Appellant,

JOSEPH R. KAPP,
Plaintiff-Appellee,

v.

NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al.,

Nos. 76-2859
76-2678
76-2879

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California .....

.....

.....and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the .....judgement of the said District Court in this Cause be, and hereby is affirmed as to the appeal of Kapp and is dismissed as to the appeal of the NFL.

Filed and entered August 4, 1978

Appendix E

MEMO AGREEMENT

The undersigned agree—

1. Kapp shall play football for the Club for the seasons of '70, '71 and '72.

2. Total compensation—$300,000, payable as follows: $50,000 on or before December 1, 1970; $50,000 in each of the following calendar years so long as Kapp shall be playing for the Club (including the option year, if any), payable in equal monthly installments on or before the 5th day of each calendar month, and thereafter in equal monthly installments of $3,125 until payment of the total compensation is made, with monthly installments paid on or before the 5th day of each calendar month.

3. The compensation involved is payable unconditionally, and even though Kapp should be incapacitated for any reason at all, or should die. In case of death, then it shall be to his estate. Provided always, however, the Club shall not be obligated to pay in case of incapacity or death entirely unconnected with Kapp's services for the Club. Kapp shall aways use his best efforts as a player, subject to and under direction of the coach. The coach shall have absolute right to decide when Kapp shall play, and whether or not he shall be continued on the roster. Such decisions shall leave the right to compensation, as above stated, however, in full effect.

4. In addition to the foregoing, Club shall have the option to have Kapp play for it for the season of '73 at a total compensation of $100,000, payable as follows: In equal monthly installments of $3,125, on or before the 5th day of each calendar month, until payment of total compensation under this paragraph, with the first installment commencing at final payment of total compensation provided for in paragraph 2 above. Option must be exercised on or before March 31, 1973.

DATED: October 6, 1970.

BOSTON PATRIOTS FOOTBALL CLUB, INC.

By WILLIAM H. SULLIVAN, JR.

(Club)

JOSEPH R. KAPP

(Player)

MEMO AGREEMENT

The undersigned agree:

1. Kapp shall serve in a public relations capacity for the Club during those years in which he will be receiving any compensation for football services ever rendered the Club.

2. Total compensation for services in a public relations capacity shall be identical with the amounts provided for under a separate agreement made herewith covering Kapp's services as a football player. The amounts shall always be the same as those at any time paid him for services ever rendered the Club as a player, and shall be paid at the same times and in the same amounts as payments related to the player contract.

3. Kapp shall not be obligated to perform services in a public relations capacity for the Club except during the football season, unless with his voluntary consent. He shall never be obligated to perform services once his services as a player have been terminated; but his right to matching compensation shall continue, nevertheless.

DATED: October 6, 1970.

BOSTON PATRIOTS FOOTBALL CLUB, INC.

By WILLIAM H. SULLIVAN, JR.
(Club)

JOSEPH R. KAPP
(Player)